

DATE: May 8, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08410

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated November 20, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law; (2) whether the Administrative Judge's findings and conclusions under Guideline J (Criminal Conduct) are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge's adverse security clearance decision is unwarranted.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 9, 2001. The SOR was based on Guideline F (Financial Considerations) and Guideline J (Criminal Conduct).

A hearing was held on September 5, 2001. The Administrative Judge issued a written decision, dated November 20, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from the Administrative Judge's adverse security clearance decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issues

1. Whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law. On appeal, Applicant: (a) states he is unable to address his consumer debts until he receives a pay raise or eliminates his child support arrearage; (b) asserts that he has always been open and forthright about his debts, and that no one could use information about his debts against him because he has made no attempt to hide those debts; (c) claims the Administrative Judge erred by finding that Applicant moved his family to a foreign country in 1995; (d) claims the Judge erred by finding that he financial problems began in the early 1990s following his divorce from his first wife in 1989; (e) explains what he has done to deal with his child support obligation; (f) states his goal is to increase his pay in order to have enough money to start a payment plan with his creditors and become current with his child support payments; and (g) indicates he will be able to pay back his creditors once he becomes current with his child support payments. The Board construes Applicant's arguments as raising the issue of whether the Judge's findings and conclusions under Guideline F are arbitrary, capricious, or contrary to law.

An applicant's candor with the government about his or her conduct and circumstances does not preclude the Administrative Judge from considering the security implications of the applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 10. Furthermore, security clearance decisions are not limited to consideration of whether an applicant is vulnerable to blackmail. An adverse security clearance decision can be based on an applicant's conduct and circumstances that have negative security significance independent of any potential for blackmail. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at p. 3. Even in the absence of any potential for blackmail, a history of financial difficulties can raise security concerns. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at pp. 2-3 (discussing security significance of history of excessive indebtedness or recurring financial difficulties). Therefore, Applicant's candor with the government about his financial difficulties did not preclude the Judge from concluding Applicant's overall history of financial difficulties raises security concerns.

The Board is required to address material issues raised on appeal to determine whether harmful error has occurred. *See* Directive, Additional Procedural Guidance, Item E3.1.32. The Board need not address nonmaterial issues raised on appeal. *See, e.g.*, ISCR Case No. 00-0683 (September 17, 2001) at pp. 3-4. Applicant's claims that the Judge made errors with respect to two specific factual findings fail to raise any material issue that warrants further discussion by the Board.

Applicant's assurances that he would pay back his creditors once he becomes current with his child support payments did not require the Administrative Judge to reach favorable conclusions under Guideline F. *See, e.g.*, ISCR Case No. 00-0365 (May 16, 2001) at p. 3 (promise to pay off unresolved debts in the future does not constitute evidence of reform or rehabilitation that requires a favorable security clearance decision). Given the record evidence that Applicant still has not resolved his financial difficulties, the Administrative Judge had a rational basis for concluding Applicant's overall history of financial difficulties warranted adverse conclusions under Guideline F.

2. Whether the Administrative Judge's findings and conclusions under Guideline J (Criminal Conduct) are arbitrary, capricious, or contrary to law. On appeal, Applicant makes factual assertions about the facts and circumstances surrounding his court-martial conviction in February 1995 and argues: (a) the military failed to properly investigate his case; (b) the military knew that he was not guilty of the conduct he was being court-martialed for; and (c) there was relevant evidence that was not admitted into evidence during his court-martial. To the extent that Applicant's brief refers

to matters which go beyond the record evidence before the Administrative Judge, Applicant's statements constitute new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. What remains of Applicant's arguments can be construed as raising the issue of whether the Judge's findings and conclusions under Guideline J are arbitrary, capricious, or contrary to law.

A DOHA proceeding is not a proper forum for Applicant to try to challenge the propriety and legal sufficiency of his court-martial proceedings. *Cf.* ISCR Case No. 00-0596 (October 4, 2001) at pp. 2-3 (DOHA proceeding not a proper forum to contest validity of civil judgment entered against applicant); ISCR Case No. 98-0648 (July 12, 1999) at p. 3 (DOHA proceedings not a proper forum to address merits committed to jurisdiction and authority of another governmental body). If Applicant believed that his court-martial proceedings were defective or otherwise not proper, then he had the option of seeking legal relief in an appropriate legal forum. Accordingly, Applicant's arguments about his court-martial proceedings fail to raise any legal claim that can be addressed in these proceedings.

If Applicant's court-martial conviction had been for a felony offense, he would have been collaterally estopped from claiming in these proceedings that he was not guilty of the offense for which he was convicted. *See, e.g.*, ISCR Case No. 99-0116 (May 1, 2000) at p. 2. However, a review of the record evidence in this case does not indicate Applicant was convicted of a felony. Accordingly, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider Applicant's claim that he was not guilty of the charges for which he was court-martialed. The Judge considered Applicant's claim in light of the record evidence as a whole and found that Applicant engaged in the misconduct for which he was convicted by court-martial. The Judge's finding reflects a reasonable interpretation of the record evidence. Applicant's appeal arguments fail to demonstrate the Judge's finding is arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge's adverse security clearance decision is unwarranted. Applicant also states: (a) he has learned from his past mistakes and has changed his life; (b) he "would never do anything that would bring further shame to my wife and children"; (c) he has always been truthful during his security investigation; and (d) he is willing and able to safeguard classified information. The Board construes these statements as raising the issue of whether the Administrative Judge's adverse security clearance decision is unwarranted.

As discussed earlier in this decision, Applicant's honesty and candor with the government did not preclude the Administrative Judge from considering the negative security implications of the applicant's conduct and circumstances.

The Administrative Judge considered and addressed the evidence Applicant presented, including: the awards and citations Applicant received during his military career; the favorable opinions expressed by Applicant's supervisor; and Applicant's explanations for his financial difficulties. The Judge concluded the favorable presented by Applicant did not outweigh or overcome the negative security implications of Applicant's overall history of criminal conduct and financial difficulties. The Judge's analysis was appropriate and not arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0345 (December 12, 2001) at p. 3 (Judge must consider both favorable and unfavorable evidence and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*).

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government need not wait until an applicant actually mishandles or fails to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An adverse security clearance decision can be based on proof of facts and circumstances that indicate an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. In this case, Applicant's criminal conviction and history of resolved financial difficulties provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board